

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CENTURY SURETY COMPANY,

Plaintiff,

v.

RIVER CITIES CONSTRUCTION,  
LLC,

Defendant.

NO. CV-11-057-RHW

**ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT**

Before the Court is Plaintiff's Motion for Summary Judgment (ECF No. 9). A telephonic hearing on the motion was held on August 9, 2011. Plaintiff was represented by Dana Ferestien. Defendant was represented by Robert Hunter.

**BACKGROUND FACTS**

This is a declaratory action. Plaintiff is an insurance company that issued a general commercial liability policy to Defendant River Cities Construction (RRC). RRC is a named-defendant in a pending lawsuit in Okanogan County Superior Court.<sup>1</sup> RRC tendered the lawsuit to Plaintiff who is defending under a reservation of rights. Plaintiff asserts that it has no duty to defend RRC and no duty to pay any

---

<sup>1</sup>The complaint alleged that Gordon Taylor, the plaintiff in the underlying suit, hired RRC to complete construction of a 12-unit building and RRC materially breached the parties' agreement by failing to perform in a workmanlike manner, doing work in a defective manner, and failing to complete the work. Additionally, RRC failed to correct and complete deficient workmanship and filed a frivolous lien.

1 claims on its behalf. It now moves for summary judgment.

## 2 ANALYSIS

### 3 A. Standard of Review

4 Summary judgment is appropriate if the “pleadings, depositions, answers to  
5 interrogatories, and admissions on file, together with the affidavits, if any, show  
6 that there is no genuine issue as to any material fact and that the moving party is  
7 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). There is no  
8 genuine issue for trial unless there is sufficient evidence favoring the nonmoving  
9 party for a jury to return a verdict in that party’s favor. *Anderson v. Liberty Lobby,*  
10 *Inc.*, 477 U.S. 242, 250 (1986). The moving party has the initial burden of  
11 showing the absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*,  
12 477 U.S. 317, 325 (1986). If the moving party meets its initial burden, the non-  
13 moving party must go beyond the pleadings and “set forth specific facts showing  
14 that there is a genuine issue for trial.” *Id.* at 325; *Anderson*, 477 U.S. at 248.

15 In addition to showing that there are no questions of material fact, the  
16 moving party must also show that it is entitled to judgment as a matter of law.  
17 *Smith v. University of Washington Law School*, 233 F.3d 1188, 1193 (9<sup>th</sup> Cir.  
18 2000). The moving party is entitled to judgment as a matter of law when the non-  
19 moving party fails to make a sufficient showing on an essential element of a claim  
20 on which the nonmoving party has the burden of proof. *Celotex*, 477 U.S. at 323.

21 When considering a motion for summary judgment, a court may neither  
22 weigh the evidence nor assess credibility; instead, “the evidence of the non-movant  
23 is to be believed, and all justifiable inferences are to be drawn in his favor.”  
24 *Anderson*, 477 U.S. at 255.

### 25 B. Interpreting Insurance Policies

26 Under Washington law, insurance contracts are construed as contracts.  
27 *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash.2d 654, 665 (2000).  
28 Interpretation of an insurance contract is a question of law. *Campbell v. Ticor Title*

1 *Ins. Co.*, 166 Wash. 2d 466, 472 (2009). Courts are to consider the policy as a  
2 whole, and give it a “fair, reasonable, and sensible construction as would be given  
3 to the contract by the average person purchasing insurance.” *Weyerhaeuser*, 142  
4 Wash. 2d at 666. If the policy language is clear and unambiguous, the court must  
5 enforce it as written and may not modify it or create ambiguity where none exists.  
6 *Id.*

7 A clause is ambiguous only “when on its face, it is fairly susceptible to two  
8 different interpretations, both of which are reasonable.” *Id.* (quoting *B & L*  
9 *Trucking*, 134 Wash.2d at 427–28. When the contract is ambiguous, the principal  
10 goal of contractual construction is to enforce the parties’ intent. *Greer v.*  
11 *Northwestern Nat. Ins. Co.*, 109 Wash. 2d 191, 200 (1987). The court may rely on  
12 extrinsic evidence of the intent of the parties to resolve the ambiguity.  
13 *Weyerhaeuser*, 142 Wash. 2d at 666. The Court determines “the parties’ intent by  
14 viewing the contract as a whole, the subject matter and objective of the contract, all  
15 the circumstances surrounding the making of the contract, the subsequent acts and  
16 conduct of the parties to the contract, and the reasonableness of respective  
17 interpretations advocated by the parties.” *Greer*, 109 Wash. 2d at 200.

18 Any ambiguity remaining after examination of the application extrinsic  
19 evidence is resolved against the insurer and in favor of the insured. *Id.* Exclusions  
20 are to be strictly construed against the drafter, but a strict application should not  
21 trump the plain, clear language of an exclusion that would result in a strained or  
22 forced construction of the clause. *Findlay v. United Pac. Ins. Co.*, 129 Wash.2d  
23 368, 374 (1996). “The contract should be given a practical and reasonable rather  
24 than a literal interpretation; it should not be given a strained or forced construction  
25 which would lead to an extension or restriction of the policy beyond what is fairly  
26 within its terms.” *Morgan v. Prudential Ins. Co. of Am.*, 86 Wash.2d 432, 434  
27 (1976). Finally, the expectations of the insured cannot override the plain language  
28 of the contract. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wash.2d 165, 171-72

1 (2005).

## 2 **C. Ambiguity**

3 The starting point is the language of the Policy. In reviewing the Policy, the  
4 Court concludes that the Policy in question is a General Commercial Liability  
5 Policy.<sup>2</sup> It is not site specific, that is, the Policy in question covers all work  
6 performed by RRC, not just the work completed at the Project that is the subject of  
7 the underlying law suit.

8 Although both parties rely on the phrase “Residential Remodeling General  
9 Contracting” that is listed as the Description in the “Limitation of Coverage to  
10 Specified Classifications, Operations, Premises, or Projects” to define the scope of  
11 the policy, any reliance on this phrase is misplaced. This term is not defined in the  
12 Policy. It does not appear to be a term of art for the insurance industry. More than  
13 likely, the underwriter of the policy lifted the phrase “Residential Remodeling  
14 General Contracting” from the Commercial Insurance Application. *See* ECF No.  
15 30, Ex. 5, p. 8.

16 It is disingenuous for Plaintiff to now argue that the Policy it issued only  
17 covered Residential Remodeling. In filing out the Contractors Questionnaire,  
18 Defendant indicated in Question 10, that ninety percent of its work was residential  
19 and 10 percent of its work was commercial/industrial. *Id.*, at p. 16. It indicated

---

20 <sup>2</sup>Plaintiff did not provide to the Court the Insuring Agreement. Defendant  
21 quoted the language contained in the Insuring Agreement in its Opposition. *See*  
22 ECF No. 25, p. 4. The Court indicated that it would rely on this language.  
23 According to Defendant, the Policy reads:

### 24 1. Insuring Agreement

25 a. We will pay those sums that the insured becomes  
legally obligated to pay as damages because of “bodily injury” or  
26 “property damage” to which this insurance applies.

27 b. This insurance applies to “bodily injury” or “property  
damage” only if:

28 ... (5) The “bodily injury” or “property damage” arises  
from:

(a) The classifications or operations show above...

1 that it did not engage of any commerical or residential new construction, rather  
2 eighty-five percent of its work was remodeling, five percent was additions, and  
3 five percent was repair. As a practical matter, if the Policy is interpreted as  
4 Defendant suggests, RRC would be uninsured for ten percent of its work. It is  
5 highly unlikely that a general contractor seeking liability insurance for its business  
6 would pay a premium for a general liability policy that did not cover 100% of its  
7 work.

8 In the end, the phrase “Residential Remodeling General Contracting” is  
9 ambiguous at best, and the Court will not construe an ambiguous phrase against the  
10 insured. The phrase “Residential Remodeling General Contracting” simply has no  
11 meaning and certainly does not limit the Policy.

12 Additionally, on the Schedule of Hazards included in the Application,  
13 “General Contractor” is listed in the classification column, which supports the  
14 conclusion that the application and subsequent policy were not limited to  
15 residential construction (ECF No. 30-1, p. 11). Finally, in filling out the  
16 Contractors Questionnaire, Defendant listed the Walker’s Furniture Store Remodel  
17 as a significant project that it has performed during the past five years, which is  
18 further evidence that the policy is not limited to residential construction (ECF No.  
19 30-1, p. 17).

20 For these reasons, the Court interprets the Policy to cover commercial as  
21 well as residential projects.

#### 22 **D. Exceptions**

23 Because the Policy in question is a general contractor’s liability policy,  
24 whether there is coverage for the Project does not hinge on whether the Project is  
25 commercial or residential in nature. Rather, the coverage depends on whether a  
26 specific Special Exclusion and Limitation contained in the Policy applies.

27 The Exclusion at issue is set forth as follows:

28 B. ....

1 This insurance does not apply to:

2 13. Residential or Habitational Construction

3 Claims, “suits”, actions, allegations, or any liability loss, cost, or  
 4 expense arising out of, relating to or in any way connected with “your  
 5 work” or “your product” involving the development, construction, or  
 6 renovation of condominiums, time shares, town homes, or tract homes  
 7 with greater than ten (10) homes, regardless of the number of units on  
 8 which the insured actually performed work.

9 This exclusion does not apply to non structural remodeling, repair or  
 10 maintenance operations on condominiums, time shares, town homes,  
 11 or tract homes with greater than ten (10) homes. This exclusion  
 12 specifically does apply to additions to such structures and any  
 13 renovation operations to convert apartments to condominiums or  
 14 time shares.

15 (ECF No. 10-1, p. 12)

16 Under a plain reading of the Policy, if the project did not involve  
 17 condominiums, there would be coverage. If the project did involve condominiums,  
 18 but the work performed on the Project was limited to non structural remodeling,  
 19 repair, or maintenance operations, there would be coverage. Conversely, if the  
 20 project involved more than ten condominiums, there would not be coverage.

21 In support of its position that there is no coverage because the Project  
 22 involved more than ten condominiums, Plaintiff provided an undated  
 23 Condominiums Sales and Listing Information. In support of its Reply, Plaintiff  
 24 provided a 2009 Washington State Joint Aquatic Resources Permit Application  
 25 Form for Sonora Shores; a February 2010 Report by Grette Associates regarding  
 26 Sonora Shores Development; and a February 2006 Geotechnical Report by  
 27 Hammond Collier (ECF No. 30). The 2009 Permit Application refers to a five  
 28 Phase project that will consist of 84 multifamily units with an amenities center  
 consisting of a swimming pool and hot tub areas for residents use and a managers  
 unit. The February 2010 Report describe the project as “five three story multi-  
 family buildings comprising a total of 84 separate units for fee simple ownership.”  
 (ECF No. 30-2, p. 32). This document states that Phase 1 is currently under  
 construction. The February 2006 Report refers to the “proposed three story

1 condominiums” and states that “there may be up to eight buildings constructed at  
2 the project site, and that the existing motel may not be demolished.” (ECF No. 30-  
3 3, p. 53).

4 Plaintiff also submitted the Declaration of Cindy Devon (ECF No. 31). She  
5 states that she had been involved with the Sonora Shores project since 2009, and  
6 RRC was hired by the project owner after she became involved in order to finish  
7 construction of the first Sonora Shores building. She asserts that RRC knew that  
8 the units in the first building were going to be sold off as residential, vacation  
9 condominiums to individual buyers because in the Fall of 2009, Clark Hicks  
10 attended the first open house for Sonora Shores to unveil the property to  
11 prospective buyers. She states that she observed Mr. Hicks talking with  
12 prospective buyers. She also states that the property where Sonora Shores is  
13 located used to be the Red Apple Motel and that this motel was demolished prior to  
14 construction of the Sonora Shores condominiums.

15 Defendant maintains that there is coverage because the Project did not  
16 involve condominiums, and the scope of the project involved non structural  
17 remodeling, rather than development, construction, and renovation of units.  
18 Defendant’s theory is that while this project may have morphed into a large  
19 condominium project, when it began work on the Project, it was a motel.

20 In support of its position, Defendant provided the Declaration of Robi  
21 Chastain, Manager of RRC, and Clark Hicks, Estimator for RRC. According to  
22 Ms. Chastain, she informed the insurance agent that RRC was not building any  
23 structures. Rather, RRC was being asked to complete the drywall, paint, cabinets,  
24 and flooring in eight of the 12 units that had already been built. She informed him  
25 that RRC was also asked to do exterior concrete work for walkways.

26 Clark Hicks stated that the Project involved 12 units that were already built.  
27 RRC was to complete the drywall, paint, cabinets and flooring in 8 of the 12 units  
28 as well as exterior concrete work for walkways. According to Mr. Hicks, the city



1 building permit identified the building as a motel.<sup>3</sup> He stated that it was not a  
2 condominium building.

3 Michael Viboch, RRC's insurance agent, stated that when he was seeking  
4 insurance coverage for RRC, he informed Ray Hyles, the underwriter for Century  
5 Surety Company, that the Project involved RRC completing a 12-unit commercial  
6 building and specifically stated that the Project did not involve condominiums.

7 The Commercial Insurance Application supports Defendant's position that it  
8 did not believe that it was working on a condominium project, or that the work  
9 involved structural construction. On Page 3 of the Application, RRC was asked:  
10 12. Any Structural Alterations Contemplated? RRC responded, "No." (ECF No.  
11 30-1, p. 13). The Application was dated April 2, 2009. On page 2 of the  
12 Contractors Questionnaire, RRC was asked: 14. Has or will any of your work  
13 involve homes in tracts of greater than 10 homes, condominiums, apartments or  
14 townhouses? RRC responded, "No." RRC was informed that if it answered no,  
15 all multi-family residential work will be excluded. (ECF No. 30-1, p. 16). The  
16 Contractors Questionnaire was signed June 4, 2009.

17 Defendant also points to the 2009 Aquatic Permit Application that states that  
18 "[t]he property is currently being used as a RV park with a single family residence  
19 and a motel under construction. (ECF No. 30-2, p. 18). This Permit was signed  
20 March 9, 2010.

21 The Court finds that genuine issues of material fact exist regarding whether  
22 the condominium exclusion applies. If the Court accepts Plaintiff's position that  
23 RRC knew from the start of its work on the project that the project involved  
24 \_\_\_\_\_

25 <sup>3</sup>Plaintiff asks the Court to strike this portion of Mr. Hicks' Declaration as  
26 inadmissible hearsay because he did not provide a copy of the permit in question.  
27 The Court is not relying on his statement for the truth of the matter asserted, rather  
28 the Court considers Mr. Hicks' statement to reflect what was his understanding of  
the scope of the Project.



condominiums, the Court would have to conclude that RRC was being untruthful or deceptive when it filled out this Application and stated that its work would not involve condominiums. It would also have to conclude that Mr. Hicks and Mr. Viboch are both misleading the Court. The Court is not willing to do so at this juncture in the proceedings. Likewise, Plaintiff's evidence does not establish conclusively that at the time that RRC began working on the project it was clearly a condominium project. The 2009 Washington State Joint Aquatic Resources Permit was completed in March, 2010. The Grette Associates Report was completed in February, 2010. Although the Geotechnical Report, dated February, 2006, refers to the "proposed condominium site in Oroville, Washington" it is clear that this Report was completed in the very early beginning stages of the project development. The Report does not establish if and when the Project got underway, and consequently, does not address Defendant's theory that at the time it worked on the Project, the building was being built as a motel.

#### **E. Estoppel**

Defendant argues that Plaintiff should be estopped from denying coverage for the Project. According to Defendant, it confirmed with its insurance agent about whether RRC had insurance coverage for the project. According the Declaration of Michael Viboch, he spoke with a "wholesale underwriter" who Viboch believed had authority to bind coverage for Plaintiff to obtain insurance for the Project. Viboch informed the underwriter about the details of the Project and the underwriter confirmed that RRC would have coverage for the Project. As set forth above, Viboch specifically told the underwriter that the projects did not involve condominiums.

Defendant's estoppel argument fails because under the Court's interpretation of the policy, Plaintiff provided the coverage that was asked for by Defendant and that was based on Defendant's representations. RRC asked for, purchased, and received coverage for a Project that does not involve condominiums. If, at a later

1 date, it is shown that the project did involve condominiums, Defendant cannot rely  
2 on estoppel to expand the coverage of the Policy to now include condominiums.  
3 *See Rizzuti v. Basin Travel Serv.*, 125 Wash. App. 602, 614 (2005).

4 **F. Remodeling vs. New Construction**

5 Defendant argues that because the project involved remodeling and not new  
6 construction, the exception to Residential or Habitational Construction Exclusion  
7 applies. Specifically, the policy states that this exclusion does not apply to “non  
8 structural remodeling, repair, or maintenance operations on condominiums, time  
9 shares, town homes, or tract homes with greater than ten (10) homes.” (ECF No.  
10 10-1, p. 12).

11 The record establishes, however, that the project involved completion of a  
12 new construction project rather than a remodeling project. In order to remodel a  
13 building, it is necessary for the building to have been previously completed.  
14 Additionally, in reading the policy as a whole, the term “remodeling” is grouped  
15 with the term “repair” and “maintenance,” which are actions taken on a completed  
16 building that would require work because of wear and tear and the passage of time.  
17 As such, the exception to the Residential or Habitational Construction Exclusion  
18 does not apply.

19 **G. Questions of Fact**

20 Given the record before the Court, it is unable to conclude that at the time  
21 RRC began working on the Project, the Project involved condominiums so that the  
22 Condominium exclusion would be triggered. If the Project involved a motel, as  
23 Defendant maintains, it appears that coverage would be afforded because the  
24 policy is not limited to residential remodeling, as Plaintiff maintains.<sup>4</sup>  
25 Consequently, the Court finds that genuine issues of material fact regarding  
26 whether the condominium exclusion excludes coverage for the Project.

---

27 <sup>4</sup>The Court makes no judgment as to whether the exclusion would kick in at  
28 some later date after RRC became aware that the project involved condominiums.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment (ECF No. 9) is **DENIED.**

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
4 Order and provide copies to counsel.

5 **DATED** this 22<sup>nd</sup> day of August, 2011.

6  
7  
8 *s/Robert H. Whaley*  
9 **ROBERT H. WHALEY**  
United States District Court

10  
11  
12 Q:\aCIVIL\2011\Century Surety Company\sj.ord.wpd  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28